En Banc Review in Federal Circuit Courts: A Reassessment

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Courts Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol72/iss8/5

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
En Banc Review in Federal Circuit Courts: A Reassessment

A "sitting en banc" is a consideration of a case by all of the judges of a United States court of appeals. It is an exception to the

usual procedure for review under which a case is heard by a panel of three judges, whose decision is deemed to be the decision of the court of appeals. Cases may be initially heard en banc or reviewed by the entire court after consideration by the three-judge panel.

of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

Without considering the possibility that retired judges may sit en banc, the size of the circuit’s en banc court is equal to the number of judgeships authorized for the circuit by Congress. The following table indicates the number of judges presently authorized for each circuit under 28 U.S.C. § 44(a) (1970):

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Number of Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>District of Columbia</td>
<td>9</td>
</tr>
<tr>
<td>First</td>
<td>3</td>
</tr>
<tr>
<td>Second</td>
<td>9</td>
</tr>
<tr>
<td>Third</td>
<td>9</td>
</tr>
<tr>
<td>Fourth</td>
<td>7</td>
</tr>
<tr>
<td>Fifth</td>
<td>15</td>
</tr>
<tr>
<td>Sixth</td>
<td>9</td>
</tr>
<tr>
<td>Seventh</td>
<td>8</td>
</tr>
<tr>
<td>Eighth</td>
<td>8</td>
</tr>
<tr>
<td>Ninth</td>
<td>13</td>
</tr>
<tr>
<td>Tenth</td>
<td>7</td>
</tr>
</tbody>
</table>

A bill is currently pending that would authorize additional judgeships for the courts of appeals. S. 2991, 93d Cong., 2d Sess. (1974). The bill would increase the number of judgeships on the First Circuit to four, the Second Circuit to eleven, the Third Circuit to ten, the Fourth Circuit to nine, the Sixth Circuit to ten, the Seventh Circuit to nine, and the Tenth Circuit to eight.


5. En banc courts may be convened in three situations. First, an en banc court may be employed in lieu of a three-judge panel. E.g., Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972); Cinerios v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 920 (1973); United States v. Gustavson, 454 F.2d 677 (7th Cir. 1971), cert. denied, 408 U.S. 925 (1972). Second, an en banc court may be convened after the case has been heard by a panel but before the panel has announced a decision. E.g., Manley v. United States, 452 F.2d 1241 (2d Cir. 1970); United States ex rel. Grays v. Bundle, 428 F.2d 1401 (3d Cir. 1970). Third, an en banc court may be convened after publication of a panel decision. E.g., United States v. Bailey, 480 F.2d 518 (5th Cir. 1973), affg. on rehearing 468 F.2d 652 (5th Cir. 1972); Gallegos v. United States, 476 F.2d 1281 (5th Cir. 1973), remanding on rehearing 466 F.2d 740 (5th Cir. 1972). The first situation is referred to as an en banc "hearing"; the last two situations are referred to as en banc "rehearings." See Maris, Hearing and Rehearing Cases in Banc, 15 F.R.D. 91, 92-96 (1958).
Prevailing theory justifies the use of the en banc procedure as promoting intra-circuit uniformity of case law through the overruling of aberrant panel decisions and as placing a maximum of judicial authority behind decisions of exceptionally important questions. A desire to conserve judicial resources in an era of staggering judicial caseloads, however, has prompted several circuit courts to adopt limiting procedures or criteria for the use of en banc review. Most recently the Second Circuit seemed to question the traditional theories supporting the en banc procedure.

This Note will examine the validity of the traditional justifications for en banc review, discuss the recent circuit court attempts to modify the procedure, and suggest possible changes that might make more effective use of it.

Two sets of factors determine when an en banc court will be convened. The first consists of federal cases and statutes that define the general procedural parameters of en banc review. The second includes the rules and practices evolved by the individual circuits. In 1948, following the Supreme Court's approval of the power to sit en banc in *Textile Mills Securities Corp. v. Commissioner*, Congress enacted 28 U.S.C. § 46(c), which provides:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

The statute plainly does no more than establish a basic procedural

---

7. See text accompanying notes 61-67 infra.
8. See text accompanying notes 79-88 infra.
9. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *rend. on other grounds*, 42 U.S.L.W. 4604 (U.S. May 28, 1974). The Second Circuit refused to grant an en banc rehearing because the court believed that the Supreme Court would grant certiorari in the case. 479 F.2d at 1020-21. This would seem to be an abandonment of the "exceptionally important" rationale for using the en banc procedure. Further evidence of judicial dissatisfaction with the procedure is found in Judge Mansfield's concurring opinion in *Eisen*. He questioned the ability of an en banc court to resolve intra-circuit disputes. 479 F.2d at 1021.
framework; substantive guidelines on when to convene en banc are not stated, and the Supreme Court has held that a circuit court's exercise of its power to sit en banc is a matter of discretion: “[The statute] is a grant of power. It vests in the court the power to order hearing en banc. It goes no further . . . . The court [of appeals] is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.” 12

The Supreme Court, however, could not resist tinkering with the “machinery,” 12 and it required that litigant requests for an en banc proceeding be considered by at least some of the circuit judges: “Counsel’s suggestion need not require formal action by the court; it need not be treated as a motion; it is enough if the court simply gives each litigant an opportunity to call attention to circumstances in a particular case which might warrant a rehearing en banc.” 14

The Court’s directive was codified in Federal Rule of Appellate Procedure 35(b), 15 under which litigants may suggest that a case is appropriate for an en banc hearing but may not compel members of the court to give their applications formal consideration. A vote on whether to hear a case en banc is taken only if “a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.” 16

13. The Supreme Court had stated at length that Congress had vested complete administrative discretion in the courts of appeals, but it reached out “in exercise of [its] ‘general power to supervise the administration of justice in the federal courts,’” 345 U.S. at 260, quoting United States v. National City Lines, 334 U.S. 573, 589 (1948), to impose “certain fundamental requirements” on the en banc procedure of the courts of appeals, including a requirement that the circuit courts provide some administrative machinery to handle litigant petitions.

If a party desires to suggest a rehearing in banc the suggestion must be made within the time prescribed by Rule 40 for filing a petition for rehearing [14 days] whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

FED. R. APP. P. 35(c).

Precedent exists that may enable a litigant to convince the Supreme Court to grant certiorari for the review on substantive grounds of a circuit court's decision to refuse or to grant an en banc hearing. While the Supreme Court has consistently voiced deference to circuit court discretion as authorized by 28 U.S.C. § 46(c) (1970), see text accompanying note 12 supra, two arguments exist for allowing review when the circuit courts fail to follow the policy guidelines of Federal Rule of Appellate Procedure 35. First, in Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247 (1953), the
The substantive criteria for determining whether to review a case en banc are thus left to be defined by the rules and practices of the individual circuits, which also govern the procedural particulars of en banc review. Substantive guidance is offered, however, by Federal Rule of Appellate Procedure 35(a), which provides that "a hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance."

Although Federal Rules of Appellate Procedure 35(a) and (b) led to a decrease in the number of inconsistencies that had existed among the operational rules of different circuits,17 significant inter-circuit Supreme Court limited circuit court discretion by requiring the consideration of litigant petitions. See note 13 supra and accompanying text. Although the Court did not require that the Ninth Circuit hold a rehearing en banc in the case before it, the "certain fundamental requirements" language that the Court used, see note 13 supra, may be broad enough to reach the Supreme Court's reversal of an en banc denial. The second argument for allowing review is based on the Supreme Court's authority to promulgate the Federal Rules of Appellate Procedure. See note 15 supra. The ultimate power to review interpretations of the rules should lie with the Supreme Court, and, accordingly, circuit interpretation and implementation of Rule 35(a) may be subject to Supreme Court scrutiny. Cf. United States v. Indrelunas, 411 U.S. 216 (1973) (involving Fed. R. App. P. 58); United States ex rel. Cerullo v. Follette, 396 U.S. 1232 (1969) (involving Fed. R. App. P. 23(b)).

17. Wide variations in circuit court administrative rules concerning en banc procedures existed prior to the adoption of Federal Rule of Appellate Procedure 35. (These administrative rules have since been repealed. The old versions may be found in 28 U.S.C.A., App.—United States Court of Appeals Rules (Supp. 1967), amending 28 U.S.C.A., App.—United States Court of Appeals Rules (1956).) The District of Columbia, the Fourth, and the Seventh Circuits had no rules dealing with en banc procedure. The administrative rules of the Second, Third, Sixth, Eighth, and Ninth Circuits detailed the procedures for en banc consideration, but they provided no substantive standards for determining when en banc review would be used. 2d Cir. R. 25 (repealed 1968); 3d Cir. R. 4(l) (repealed 1968); 6th Cir. R. 3(l) (repealed 1968); 8th Cir. R. 4(a), 15(c) (repealed 1968); 9th Cir. R. 23 (repealed 1968). The Tenth Circuit used en banc as a device to limit appeals of interlocutory orders under 28 U.S.C. § 1292(b) (1970). It allowed § 1292(b) appeals only with the permission of the entire court sitting en banc. 10th Cir. R. 12(b) (repealed 1968). Similarly, the Tenth Circuit required en banc approval of appeals under § 24 of the Bankruptcy Act, 11 U.S.C. § 47 (1970), 10th Cir. R. 13(a) (repealed 1968). Only the Fifth Circuit provided general substantive guidelines for en banc determination:

A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

5th Cir. R. 25a (repealed 1968).

Following the promulgation of Federal Rule of Appellate Procedure 35, the Second, Fourth, and Tenth Circuits rescinded all of their rules on en banc consideration. The remaining circuits provide for the en banc procedure in their rules, but for the most part the rules duplicate or refer to 28 U.S.C. § 46(e) (1970) and/or Federal Rule of Appellate Procedure 35. See D.C. Cir. R. 14; 9th Cir. R. 2(3); 5th Cir. R. 12; 6th Cir. R. 3(b); 7th Cir. R. 4(0); 8th Cir. R. 2(3); 9th Cir. R. 12.
variations remain. Nevertheless, it is possible to offer a general outline of en banc procedure in the eleven circuits.

The general practice is to distribute requests for en banc review to all active circuit judges, along with whatever supplementary information it is the practice of the court to provide, and to set a deadline for the submission of votes. Some circuits also circulate the requests among senior circuit judges and visiting judges. The additional materials that are routinely circulated vary, although judges are always free to request any available information. Some circuits circulate copies of briefs on file and opinions (or prospective opinions, when a rehearing en banc is requested subsequent to

---

18. For example, the role of the three-judge panel in adjudicating requests differs significantly among the circuits. In the Ninth Circuit, the panel recommends whether or not a case should be reheard en banc. The other judges of the circuit may overrule the panel decision to grant a rehearing. In Banc Hearings, General Order No. 15, United States Court of Appeals for the Ninth Circuit 2-5 (rev. May 14, 1969) [hereinafter In Banc Hearings]. In the Fifth Circuit, the three-judge panel may grant a panel rehearing following the receipt of a petition for rehearing, but it does not formally recommend action on the en banc question. Petitions for Rehearing En Banc Procedure ("The Pink Slip"), United States Court of Appeals for the Fifth Circuit 8 (July 1972). The same procedure is followed in the Second Circuit, but the panel does not recommend action with respect to the en banc question. If a panel rehearing is denied, the result of the panel's vote is circulated with the en banc voting forms.

Memorandum to Docket Clerks of the United States Court of Appeals for the Second Circuit, Processing Petitions for Rehearing and Petitions for Rehearing Containing a Suggestion that the Action Be Reheard En Banc 2 (Dec. 1972) [hereinafter Second Circuit Memorandum]. The Third Circuit has no formal provision for notifying other court members of the panel's opinion on the suitability of a case for a rehearing. 3d Cir. Internal Operating P. §§ M-P (rev. March 1, 1974).

19. See, e.g., Second Circuit Memorandum, supra note 18, at 1; Telephone Interview with Richard Windhurst, Deputy Clerk, United States Court of Appeals for the Fifth Circuit, New Orleans, La., Feb. 5, 1974 [hereinafter Windhurst Interview]; Telephone Interview with Robert C. Tucker, Clerk, United States Court of Appeals for the Eighth Circuit, St. Louis, Mo., Feb. 5, 1974 [hereinafter Tucker Interview].

20. For example, the Fourth Circuit circulated rehearing requests among the senior judges who sat on the panel that initially heard the case. Telephone Interview with William K. Slate, Clerk, United States Court of Appeals for the Fourth Circuit, Richmond, Va., Feb. 2, 1974 [hereinafter Slate Interview]. The Eighth Circuit circulated rehearing requests to senior circuit judges and visiting judges who sat on the original panel. Tucker Interview, supra note 19.


oral argument before a panel but before an opinion has been filed) are often made available. Informal personal communication may of course take place among the judges, and a judge who requests that the court sit en banc may send a justifying memorandum to the others on the court. If a litigant requests an en banc court, and no judge in regular active service asks for a poll of the court, the request is summarily denied. If a judge initiated the request, or if a judge requested that a poll be taken in response to a litigant’s request, the judges have a set period in which to vote. Failure to vote within the allotted time is considered a vote against en banc consideration. If a majority of the active judges on a circuit vote to rehear a case en banc, litigants may be permitted to file supplementary briefs and to reargue orally; permission is granted or withheld as a matter of course in some circuits, while others decide on a case-by-case basis.

23. This will ordinarily occur only upon the request of a judge, since it is unlikely that a litigant would request an en banc rehearing without knowing the outcome of his appeal before the panel. None of the 256 litigant petitions for en banc rehearings filed in the Seventh Circuit between September 1, 1969, and August 31, 1973, were filed after oral arguments but before a formal panel opinion. Swygert Letter, supra note 21.

24. See Maris, supra note 5, at 93-94. For a four-year period between September 1, 1969, and August 31, 1973, a panel opinion was available in all 256 requests for rehearings en banc in the Seventh Circuit. Swygert Letter, supra note 21. See also In Banc Hearings, supra note 18, § 2: “[A] panel should not ordinarily request a rehearing in banc unless and until the members of the panel have first expressed their views in the form of a proposed opinion or opinions.”


28. See, e.g., Second Circuit Memorandum, supra note 18, at 2.

29. This is the practice in the Ninth Circuit. Luck Letter, supra note 22.


32. This is the practice in the Fifth and Sixth Circuits with respect to both
The major drawback of en banc review is its heavy cost in court and litigant time and expense. The availability of the procedure taps the court's resources in three ways. First, litigant suggestions for a hearing or rehearing en banc necessitate much fruitless consideration of case records by all of the judges of a circuit. In fiscal year 1973, for example, 135 suggestions were filed in the District of Columbia Circuit; only three suggestions resulted in en banc hearings, but all required the attention of each circuit judge. Second, the grant of an en banc hearing or rehearing considerably lengthens the time required for the disposition of the case. A survey of recent cases in two circuits revealed that cases reheard en banc take approximately five-and-one-half times longer to reach final decision than cases heard and disposed of by three-judge panels, and cases initially heard en banc take approximately two-and-one-half to three-and-one-half times longer than cases heard and disposed of by three-judge panels. Third, en banc hearings occupy all of the active judges of the circuit with the adjudication of a single case. In the Fifth Circuit, for example, fifteen judges will hear a single case, absent vacancies and visiting judges. If the court was not sitting en banc, those judges would be available to sit on three-member panels and consider simultaneously five separate cases. The burden on judicial time is especially significant at present, for federal circuit courts currently labor under very heavy caseloads. The average number of appeals filed per judgeship in the eleven courts of appeals supplementary briefs and oral argument. Windhurst Interview, supra note 19; Phillips Letter, supra note 3. This is the practice in the Ninth Circuit with respect to oral argument. Luck Letter, supra note 22.

33. Kline Letter, supra note 3.


35. A survey was made of all cases heard by three-judge panels appearing in volumes 454 and 455 of the Federal Reporter (2d Series) for the District of Columbia and Second Circuits. The average time between oral argument and the filing of an opinion in cases heard by three-judge panels was 95 days in the District of Columbia Circuit and 50 days in the Second Circuit. The average time between initial argument and filing of the en banc opinion in twenty cases reheard en banc by the District of Columbia Circuit between 1966 and 1972 was 533 days, or nearly 1.5 years. Five of the twenty cases lasted over two years. In eight cases that were initially heard en banc by this court during this time period, the average time between argument and the filing of an opinion was 326 days. The average time between initial argument and the filing of the en banc opinion in fifteen cases reheard en banc by the Second Circuit between 1963 and 1971 was 275 days. The court required an average of 129 days to file an opinion in two cases that were initially heard en banc during this period.

36. See note 2 supra.

has tripled between 1960 and 1973. Several circuit reorganization proposals have been advanced as partial solutions, but all circuits seek to ease their load by making more efficient use of court time. For example, oral argument has been drastically curtailed in some circuits, and "the use of judgement orders and per curiam opinions has risen dramatically." 

Finality is also impaired by the availability of en banc rehearings. The possibility that the decision of a three-judge panel may be overturned by an en banc court may result in routine suggestions for an en banc hearing by the losing party. If a rehearing is granted, continued litigant expense for preparation and presentation can be expected.

The heavy costs of the en banc procedure in terms of court time and litigant expense should establish a strong presumption against its use in most cases, rebuttable only by clearly demonstrable benefits. Seen in this light, the accepted rationales for the procedure, which not only justify the existence of the en banc power but also determine the situations in which it should be exercised, are insufficient. Their vagueness and overbreadth have brought about an excessive use of the en banc procedure.

Justice Douglas's majority opinion in Textile Mills contains a classic statement on en banc power. After concluding that the language of the Judicial Code did not forbid the impaneling of en banc courts, he stated: "Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases." These points

38. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE 1 (1973). Many cases are now decided without opinions. A list of such cases can be found at 492 F.2d 1237-48 (1974).

39. E.g., AMERICAN BAR FOUNDATION, supra note 37; COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, supra note 38.

40. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, supra note 38, at 1.


42. The time needed for disposition of the case is considerably lengthened, see note 34 supra and accompanying text, and the lawyers involved in the case often file supplementary briefs and reargue the case orally. See notes 29-32 supra and accompanying text.


44. 314 U.S. at 334-35.
have been codified in Federal Rule of Appellate Procedure 35, as noted above.45

The first rationale—that en banc hearings resolve intra-circuit conflict by establishing rules of law for the circuit—is based on several assumptions. First, the rationale implies that an en banc decision carries more precedential weight than a regular panel decision, and that it provides the judges of the circuit with a better guide for future reference.46 Also, the threat of a reversal upon rehearing en banc presumably restrains a three-judge panel from reaching a decision that is inconsistent with prior decisions of the same circuit.47 This "restraint" theory itself assumes that en banc rehearings are used, or may be used, to overrule aberrant panel decisions.48

In practice, however, the power to sit en banc has not always solved the problem of inconsistent panel decisions.49 In a small but not insignificant number of cases an en banc court cannot produce a majority opinion.50 Furthermore, even a majority decision seldom ends disagreement,51 and the host of separate opinions that an en banc court often writes may obfuscate the court's holding.52 Indeed, "[f]ailure to agree en banc may leave judges unwilling to respect the en banc precedent strictly in subsequent panel decisions,"53 and the weight of a past en banc decision or the threat of future en banc review may be ineffective against determined dissenters.54 Accordingly,

45. See text following note 16 supra.
46. See Maris, supra note 5, at 96; Note, supra note 34, at 583. Courts often note that a decision was decided en banc when relying on it for authority. E.g., LaShine v. United States, 374 F.2d 285, 290 n.8 (D.C. Cir. 1967); United States v. H.N. White & Co., 359 F.2d 703, 711 (2d Cir. 1966); United States v. Montreal Trust Co., 358 F.2d 239, 247-48 n.4 (2d Cir.), cert. denied, 384 U.S. 982 (1966); Dykes v. United States, 349 F.2d 337, 338 (D.C. Cir. 1965).
47. See Carrington, supra note 34, at 581; Maris, supra note 5, at 96.
48. "Determinations by the courts of appeals in banc . . . enable the court to maintain its integrity as an institution by making it possible for a majority of judges always to control and thereby to secure uniformity and continuity in its decisions . . . Without the procedure in banc it would be possible for different panels of the court to reach and apply in individual cases diametrically opposite conclusions upon important questions of law or practice." Maris, supra note 5, at 96. See also Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1025 (2d Cir. 1973) (Oakes, J., dissenting), revd. on other grounds, 42 U.S.L.W. 4804 (U.S. May 28, 1974).

In the Third Circuit only an en banc decision may overrule a prior panel decision. 3d Cir. Internal Operating P. § M (rev. March 1, 1974).
49. See Carrington, supra note 34, at 583; Note, supra note 34, at 583.
51. See Note, supra note 34, at 583.
52. Id. at 588-84.
53. Id. at 588. See also Carrington, supra note 34, at 583 n.187.
54. For example, in Whalen v. United States, 946 F.2d 812 (D.C. Cir.), cert. denied,
many judges list intra-circuit consistency as merely a secondary rationale for the use of en banc power. Judge John Brown of the Fifth Circuit supports this view and notes that since 1968 only three of forty-six en banc hearings in his circuit involved outright conflicts among prior panels, and only another four or five involved possible conflicts. Further evidence of judicial dissatisfaction with the en banc procedure as a remedy for intra-circuit inconsistency is found in Judge Mansfield's concurring opinion in *Eisen v. Carlisle & Jacquelin* in which he stated: "If the recent history of en banc proceedings in this Court is any indication, . . . an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court." Mansfield echoed this view in *Eisen v. Carlisle & Jacquelin*, 51 in which he stated: "If the recent history of en banc proceedings in this Court is any indication, . . . an *en banc* hearing would result in opinions expressing diverse views, necessitating ultimate resolution by the Supreme Court." Mansfield echoed this view on rehearing held by a vote of 6-2 that a trial judge may proceed to trial on the basis of a hospital report certifying that an accused is competent to stand trial, if the government or the accused fails to make a timely objection. Judges Bazelon and Wright argued that the trial judge had abused his discretion by not ordering an independent judicial hearing to determine competency. 346 F.2d at 819 (Bazelon & Wright, JJ., dissenting). In *Hansford v. United States*, 366 F.2d 920 (D.C. Cir. 1966), Judges Bazelon and Wright formed a panel majority and reversed a trial judge's decision not to hold an independent competency hearing. The decision is difficult to justify in light of *Whalem*. Judge Danaher dissented, arguing that the decision was contrary to the precedent established for the circuit by *Whalem*. 365 F.2d at 926-31. Two years later, in *Green v. United States*, 389 F.2d 949 (D.C. Cir. 1967) (en banc), the court reaffirmed *Whalem*. Judges Bazelon and Wright again dissented. 389 F.2d at 985. See also Note, supra note 54, at 583 n.122.


57. 479 F.2d 1005, 1021 (2d Cir. 1973), *reov. on other grounds*, 42 U.S.L.W. 4804 (U.S. May 28, 1974).

58. 479 F.2d at 1021.
in *Boraas v. Village of Belle Terre,* stating that an en banc hearing would not effect a binding precedent for the circuit in other cases because of the vagueness of the standards controlling the case and because "our views would be expressed by a divided court." 59

The second commonly stated justification for en banc hearings or rehearings is the desirability of having all the judges of a circuit participate in a case of "exceptional importance." 61 Heavy workloads do not permit en banc consideration of all cases that provoke disagreement. Therefore, judges do not normally vote for en banc hearings each time they disagree or are likely to disagree with a panel decision. Only those controversial cases that are thought to deserve special consideration are heard en banc.

One obvious problem with such a criterion is that the bulk of cases defy rigid classification; each judge has a different conception of an "exceptionally important question." 62 Evaluation of a case as exceptionally important is often intuitive, 63 and it is difficult, if not impossible, to predict which cases will be considered exceptionally important by a majority of judges sitting on a court of appeals.

Nevertheless, three notions apparently underlie the "exceptional importance" rationale. First, the participation of the entire complement of circuit judges is said to enhance the process of adjudication. A larger number of judges may be more likely to "represent a sound consensus about the values expressed in national law" 64—in other words, more minds are better. 65 Second, a sitting en banc adds to the authority of the resultant decision by eliminating the possibility that a fortuitous composition of the panel determined the result. 66 Third,
en banc consideration of exceptional cases allows all of the judges to participate in cases of significant public interest and exposure.\(^{67}\)

Institutional harmony may be advanced by permitting judges to participate in important cases about which they have strong feelings.\(^{67}\)

The first notion has inherent limitations. There is an upper limit—upon which judges do not agree\(^{68}\)—on the number who can function effectively as one court.\(^{68}\) Beyond some point the quality of debate may suffer and the decision-making process may become unwieldy. Moreover, it has not been possible to correlate a higher quality of decisions with a larger number of decision-makers.\(^{70}\)

The second aspect of the “exceptionally important” rationale—that en banc decisions will be more authoritative—has two components. First, in cases involving sensitive political issues\(^{71}\) or the on many courts of appeals, and he concludes that “an element of justice-by-lottery is inherent in the three member panel device.” Id. at 481.

67. “[T]he Circuit Judges of the Third Circuit think that . . . [the en banc] procedure has been very helpful in maintaining the very high esprit de corps which they enjoy. For each of them knows that in any case in which they are seriously divided in opinion they will all have an opportunity to participate in the ultimate decision which the court is to make and which under the doctrine of stare decisis is to be binding on them in future cases.” Maris, supra note 5, at 96–97.

Dissatisfaction with not being allowed to participate in what a judge considers to be a significant decision can perhaps be detected in two cases. In Armstrong v. Board of Educ., 323 F.2d 333 (5th Cir. 1965) (Cameron, J., dissenting), cert. denied, 376 U.S. 908 (1964), Judge Cameron charged that panel assignments in civil rights cases were manipulated so that the results would generally agree with the views of a four-judge majority of the court. 323 F.2d at 359. In Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), revd. on other grounds, 42 U.S.L.W. 4804 (U.S. May 28, 1974), Judge Oakes, after emphasizing the “extreme importance” of the case, 479 F.2d at 1022 (Oakes, J., dissenting), stated: “Never to use the en banc procedure would tend to fragment a court of 14 or 15 judges into panels of three, enabling a given panel—which sometimes consists of judges not appointed to the particular circuit court—to determine cases for the whole court.” 479 F.2d at 1025.

68. Of fourteen circuit judges who responded to a question on the upper limit of participation on an en banc court, seven felt that nine judges was the maximum, E.g., Wilkey Letter, supra note 21; Graven Letter, supra note 62; Lay Letter, supra note 25. Two judges felt that eleven was the maximum. Seitz Letter, supra note 24; Stevens Letter, supra note 55. Two judges felt that fifteen was the maximum. Dyer Letter, supra note 25; Simpson Letter, supra note 21. One judge felt that seven was the maximum. Letter from Tenth Circuit Judge to the Michigan Law Review, Oct. 2, 1973 (name withheld by request). One judge felt that ten was the maximum. Godbold Letter, supra note 55.

69. See Carrington, supra note 34, at 584.

70. “[T]he process of deciding the competing goals of the process, the culmination in an opinion, and the most telling procedures in regard to each of these differ not at all whether the bench be made up of three or nine, whether it be a panel or a division or a whole court.” K. Llewellyn, The Common Law Tradition: Deciding Appeals 313 (1959).

integrity of the judicial process the court may desire that its decision be as "official" and as widely acceptable as possible. Although some fortuity in result due to the chance composition of panels is accepted as inevitable in most cases, "justice-by-lottery" is patently unacceptable in cases that arouse deep public emotion or impugn the integrity of a branch of government. Second, in cases that will significantly affect many future decisions by determining major doctrinal trends—so-called "leading cases"—the court may seek an en banc hearing to reduce the risk that an aberrant panel decision will bind the full circuit to an unfortunate position. This argument may reflect the increasing law-making function of the federal circuit courts, which, due to the tremendous increase in judicial business, now perform a good deal of the national law-making that in earlier times would have been undertaken by the Supreme Court. In practical terms the courts of appeals are often national courts of last resort.

These arguments assume that three-judge panels, in certain cases, have less ability than a court sitting en banc to issue legitimate, binding, and popularly acceptable decisions. However, panel decisions have been accepted as fully binding authorities since the creation of the courts of appeals. It is hard to see why certain cases, usually singled out by judicial whim, would lack the necessary authority if decided by panels. Furthermore, as noted above, en banc hearings do not necessarily result in definitive rulings. There are thus no compelling reasons to believe that en banc hearings more

---

72. See, e.g., General Tire & Rubber Co. v. Watkins, 373 F.2d 361 (4th Cir. 1967) (en banc) (writ of mandamus to compel a district judge to transfer a case to another court); Texaco, Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 353 U.S. 956 (1966) (a district judge forced to withdraw from a case because of his relationship with attorney representing a party).

73. See Goldman, supra note 66, at 454; Comment, supra note 43, at 449 n.12.

74. See note 66 supra.

75. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972). The study group concluded that the decline in the percentage of petitions for certiorari granted during the past three decades "seem[ed] to reflect a lessening of the proportion of cases worthy of review, but rather the need to keep the number of cases argued and decided on the merits within manageable limits as the docket increases." Id. at 580. Many circuit court decisions have significantly affected national jurisprudence. E.g., United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 997 (1969).

76. "[i]n our federal judicial system [the courts of appeals] ... are the courts of last resort in the run of ordinary cases." Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326, 335 (1941). See also P. Carrington, United States Civil Appeals, Report to the Administrative Conference of the United States 5, Feb. 28, 1973.

77. See Carrington, supra note 54, at 581; Comment, supra note 43, at 448 n.3, 450. The en banc procedure is a relatively recent innovation. The procedure was not officially approved by the Supreme Court until Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326 (1941).

78. See text accompanying notes 49-59 supra.
authoritatively resolve sensitive issues or more correctly dictate major doctrinal trends than three-judge panels.

The final justification for the "exceptionally important" rationale—judicial harmony—deserves little comment. A judge's desire to express his views on cases of public notoriety or import does not justify spending the increased time and expense that en banc hearings necessitate.

The two rationales traditionally offered to support the use of the en banc power and to establish criteria for the selection of cases for full court review are thus of questionable value. Nevertheless, the en banc decisional format may prove useful in selected cases. Methods of reforming the procedure to limit its inefficiency may take two directions. First, the costs of en banc review—the increases in court time spent on individual cases and in expense to litigants—can be reduced by procedural modifications. Second, criteria for the exercise of en banc power can be developed to limit the use of the procedure to cases that offer tangible returns for the court time expended.

Three circuit courts, apparently cognizant of the costs entailed by en banc review, have formally adopted procedures to limit its use. The Ninth Circuit uses an informal screening device: If the three-judge panel that is hearing or has heard the case decides (either sua sponte or in response to a suggestion by a party or by a member of the court) that review en banc is not appropriate, other members of the court may acquiesce in that determination without conducting a poll of the entire court. 79 This procedure reduces the number of judges participating in the decision to grant review and thereby lowers the fixed cost of maintaining the en banc option. If a judge disagrees with the panel's recommendation, however, he may still request a vote of the entire court. 80 The effectiveness of the screening device is thus speculative; it depends on the deference afforded the panel's determinations by the other circuit judges.

A recently adopted rule in the Third Circuit requires that a petitioner for a rehearing en banc file a statement documenting the possibility of a significant intra-circuit conflict or noting the issue of exceptional importance that justifies en banc consideration. 81 The rule should make it easier for the court to identify clearly unmeritorious petitions. 82 It should be noted, however, that it applies only to petitions. Judges are not required to respond to the requests with written opinions.

79. In Banc Hearings, supra note 18, §§ 4-5.
80. Id. § 5.
81. 3d Cir. R. 22.
82. Written litigant petitions serve functions very similar to those served by party pleadings. Pleadings provide the court with sufficient information quickly to dispose of unmeritorious claims. C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 293 (2d ed. 1970).
Neither proposal attempts to redefine the criteria for the decision to invoke the power to sit en banc. The Second Circuit, however, has sought to amend the traditional justifications. The court declined to sit en banc in *Eisen v. Carlisle & Jacquelin* because of the likelihood that the Supreme Court would grant certiorari. In effect, the court reversed the "exceptional importance" rationale by citing the importance of the case as a ground for denying a rehearing en banc. It stated that a rehearing would merely delay consideration by the Supreme Court and unnecessarily burden the court of appeals. Although the Supreme Court did ultimately decide the case, the majority's technique prompted a vigorous dissent that noted the danger of speculation about the likelihood of certiorari in a given case. Under the current assumption that en banc courts are justifiable in cases of exceptional importance, it seems unwise to base a decision on en banc review on an assessment of certiorari potential. If the court guesses incorrectly, it will have foreclosed review of exactly the type of case that deserves en banc treatment under prevailing theory. Furthermore, the workability of the "certiorari potential" criterion depends on the exercise of judicial self-restraint on a case-by-case basis. Such open-ended criteria have proved inadequate to limit sufficiently en banc review.

On balance, the efforts of the three circuits are notable but not very promising: The effect of the Ninth Circuit's screening device is

---

83. 479 F.2d 1005 (2d Cir. 1973), rev'd on other grounds, 42 U.S.L.W. 4804 (U.S. May 28, 1974).
84. This approach had been hinted at in earlier opinions. See, e.g., *Borras v. Village of Belle Terre*, 476 F.2d 806, 826 (2d Cir. 1973), rev'd on other grounds, 42 U.S.L.W. 4475 (U.S. April 1, 1974). There is evidence that the practice is followed informally in other circuits. See, e.g., *United States v. Bland*, 472 F.2d 1329, 1350 (D.C. Cir. 1972) (McGowan & Leventhal, JJ., concurring) (denial of en banc rehearing).
85. Judge Kaufman, writing for the majority, felt that the exception did not subvert the "exceptional importance" doctrine:
   Our decision to decline en banc consideration of this case in no way implies . . . the demise of en banc in future cases of exceptional importance; nor does it threaten to turn this collegial court into a fragmented judicial body of panels of three, in which each panel's opinions speak only for the panel, and not for the whole Court. Instead, we wisely speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration.

479 F.2d at 1021. Despite this assertion, all cases that are significant enough to command Supreme Court review would seemingly be "exceptionally important." In denying those cases en banc treatment the court is framing a very broad exception.

86. 479 F.2d at 1021.
88. It is said or suggested that this case is so important that it will surely result in a grant of certiorari. With all respect I do not know how we can be so prescient about the United States Supreme Court. It may decide that it wants to hear from other circuits, and have a more balanced view before it than what is now the Second's, before it grants the all powerful writ. The Court may decide that it prefers to postpone the issue until another day, for reasons of internal administration or external policy.
479 F.2d at 1026 (Oakes, J. dissenting).
at best speculative; the Third Circuit's requirement that litigant petitions be in writing is a meager advancement; and the certiorari potential criterion of the Second Circuit is substantively inconsistent and effectively unenforceable. Additional means of limiting en banc hearings and rehearings to appropriate cases must be considered.

The fixed cost of the en banc procedure—the spending of an inordinate amount of judicial time on a single case—can best be reduced by eliminating litigant petitions and instituting rigid panel screening.

Litigant petitions provide little benefit for their drain on court time. In some circuits it has become common practice for the losing party to file a petition for a rehearing en banc, seemingly without regard for the directive of Federal Rule of Appellate Procedure 35(a) that en banc rehearings be reserved for exceptionally important cases and intra-circuit conflicts. The petitions are rarely granted, and often the court does not even vote on the issue. Whether or not there is a vote, however, the judges must spend time considering the petitions. They are faced with an unnecessary dilemma: They must either consider the petitions in detail, which is an unwise expenditure of energy in light of the small number of petitions granted, or give them only pro forma review, which effectively renders meaningless the right to petition for en banc consideration.

Elimination of litigant petitions would require an affirmative

---

89. Note, supra note 41, at 729-30 n.246.
90. In the District of Columbia Circuit 135 litigant requests for en banc review were filed in fiscal year 1973. Only 1 rehearing and 2 hearings en banc were granted. Kline Letter, supra note 3. In the Seventh Circuit, 40 litigant petitions were filed during the 1969 term; only 3 rehearings en banc were granted. Of 52 petitions in the 1970 term none were granted; of 70 petitions in the 1971 term 3 were granted; and of 94 petitions in the 1972 term 5 were granted. Swygert Letter, supra note 21.
91. For example, 40 litigant petitions produced only 10 votes in the 1969 term of the Seventh Circuit. Ten votes were taken out of 52 petitions in the 1970 term; 10 votes were taken out of 70 petitions in the 1971 term; and 11 votes were taken out of 94 petitions in the 1972 term. Swygert Letter, supra note 21.
92. A litigant request for an en banc court is circulated among all of the active judges of the circuit, who must determine whether to ask for a vote on the request. See text accompanying notes 19-20 supra. Consideration of the request may involve reading briefs, the final or tentative opinion of the three-judge panel, and intra-circuit memoranda. See note 24 supra and accompanying text.
93. See Note, supra note 41, at 732.
94. The case for elimination of petitions for en banc hearings may be less compelling than that for eliminating petitions for en banc rehearings. En banc hearings are seldom held. “During my tenure on the court there has been no case initially heard by the court en banc, and I can recall only one such suggestion.” Phillips Letter, supra note 3. See also Swygert Letter, supra note 21 (only five votes on en banc hearings, with one passing, held in the Seventh Circuit between 1969 and 1973); Kline Letter, supra note 3 (only two hearings held en banc in the D.C. Circuit during fiscal year 1973). Litigants rarely petition for initial hearings en banc. For example, in the Seventh Circuit there were no litigant requests for en banc hearings between September 1, 1969, and August 31, 1973. Only one litigant requested a hearing en banc in the Ninth Circuit during fiscal year 1973. Luck Letter, supra note 22, at 93.
change in the law. Either appropriate legislation must be passed by Congress\textsuperscript{95} or the Supreme Court must be convinced to alter its decision in \textit{Western Pacific Railroad Corp. v. Western Pacific Railroad},\textsuperscript{96} which requires that litigants’ “suggestions” be heard.\textsuperscript{97}

A second method of minimizing the judicial energy spent on deciding whether to grant en banc review would be to establish a rigid panel screening procedure. Judges on the panel could, therefore, foreclose a vote on the grant of review.\textsuperscript{98} Final authority to order exercise of the en banc power, however, would remain with the entire court. The proposal would vest more authority in the panel than does the current procedure of the Ninth Circuit because it would not allow another judge on the circuit to overrule the panel’s decision to forego a vote.\textsuperscript{99} Allowing the panel to perform this screening would free the other judges from the task of familiarizing themselves with each case in order to determine if a vote would be proper. Moreover, there is no evidence that decisional quality would suffer. In fact, decisions to deny en banc review may be better founded when made only by judges who, by virtue of their participation on the panel, are familiar with the merits of the case.

The elimination of litigant petitions and the establishment of a panel screening procedure would conserve judicial time and energy. Neither proposal presupposes a change in the substantive criteria for the decision to convene en banc. However, as discussed above,\textsuperscript{100} the traditional criteria of “intra-circuit conflict” and “exceptional importance” are too liberal in light of the burgeoning caseloads of the appellate courts. It may be more profitable to reserve en banc treatment for those rare conflicts that involve the integrity of the judicial process. Cases that have dramatic political repercussions,\textsuperscript{101} and perhaps cases involving professional discipline,\textsuperscript{102} must be free from

\textsuperscript{95} U.S. Const. art. III, § 1, gives Congress the power to promulgate rules for the courts of appeals: “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

\textsuperscript{96} 345 U.S. 247 (1953).

\textsuperscript{97} The Supreme Court could also eliminate litigant petitions by promulgating an amendment to the Federal Rules of Appellate Procedure. See note 15 supra.

\textsuperscript{98} The Supreme Court approved of such a scheme in dictum in \textit{Western Pacific}: “The manner in which [en banc] power is to be administered is left to the court itself. A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing \textit{en banc} to the three judges who are selected to hear the case.” 345 U.S. at 259.

\textsuperscript{99} See text accompanying notes 79-80 supra. However, this procedure would give the panel less authority than a discontinued Eighth Circuit practice that gave the original panel the final authority to grant or deny requests for en banc proceedings. See Comment, supra note 43, at 453.

\textsuperscript{100} See text accompanying notes 33-42, 46-54, 61-78 supra.

\textsuperscript{101} See cases cited note 71 supra.

\textsuperscript{102} See, e.g., \textit{In re Ewers}, 379 F.2d 474 (D.C. Cir. 1966) (en banc).
claims of arbitrariness based on the constituency of the particular panel. En banc hearings, if restricted to these cases, will be few in number.

Ultimately, however, the success of any efforts to limit the use of the en banc procedure must rely on the reasoned self-restraint of the circuit judges. Two procedural devices may contribute to decisional rationality in this area. First, it may be useful to require a larger degree of consensus among circuit judges before en banc review will be ordered. Instead of the majority vote presently required under 28 U.S.C. § 46(c), Congress could require an affirmative vote of two thirds. This would ensure that only the few cases that clearly merit consideration by the full court would receive it. Second, courts should be encouraged or required to state the grounds on which a case is granted en banc treatment. Explication would foster the development of a consistent body of principles and enhance the ability of the courts to evaluate the worth of the en banc procedure and to determine the situations in which it is appropriate. Written opinions would develop circuit court consistency and expertise on the en banc question by expanding the pool of information from informal personal knowledge to historical and inter-circuit experience. Written opinions in general add considerable rationality, continuity, and legitimacy to the decision-making process. \(^{103}\) Also, forcing litigants to submit written justifications for their petitions for en banc review (assuming such petitions continue to be allowed), as is the practice in the Second Circuit, makes little sense unless a body of principles has been developed that can provide a suitable basis for the litigant's arguments. If no adequate principles emerge, and if procedural devices to limit the heavy costs of en banc review are not implemented, then perhaps the en banc procedure should be eliminated.

\(^{103}\) The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published "opinion" which tells any interested person what the cause is and why the decision—under the authorities—is right, and perhaps why it is wise.

\[\ldots\] 

\[\ldots\] The opinion serves as a steadying factor which aids reckonability. Its preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of the effects ahead.

K. LLEWELLYN, supra note 70, at 26.